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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–490

MCDONNELL DOUGLAS CORPORATION, PETITIONER

v.

PERCY GREEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals is reported at 463 F. 2d 337 (Pet. App. A–1 to A–38). The opinion of the district court is reported at 318 F. Supp. 846 (Pet. App. A–40 to A–49).

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1972. On petition for rehearing, judgment was re-entered with a revised opinion on May 12, 1972. A second petition for rehearing and a petition for rehearing *en banc* were denied on June 28, 1972. The petition for a writ of certiorari was filed on Sep-

tember 23, 1972, and granted on December 4, 1972. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly stated the principles pertaining to the order and nature of proof which the district court should observe in trying respondent's claim of employment discrimination.

STATUTES INVOLVED

Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(a)(1), in pertinent part provides:

> It shall be an unlawful employment practice for an employer * * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–3(a), in pertinent part provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment * * * because he has opposed any practice made an unlawful employment practice by this subchapter * * *.

INTEREST OF THE UNITED STATES

Pursuant to Title VII of the Civil Rights Act of 1964, 78 Stat. 253 *et seq.*, 42 U.S.C. 2000e *et seq.*, the Department of Justice and the Equal Employment Opportunity Commission are responsible for the administra-

tion and enforcement of federal statutory prohibitions against discrimination in employment on account of race, color, religion, sex or national origin. This case raises a question concerning the order and nature of proof in employment discrimination actions brought under Title VII. The Court's resolution of this question in the context of this private suit may affect federal administration and enforcement of the Act.

STATEMENT

Respondent, a black, was "active and publicly involved in civil rights activities * * * [during] the early 1960's" (Pet. App. A–41). In 1964, he was dismissed from employment with petitioner in the course of a general reduction in petitioner's work force (Pet. App. A–2, A–43). After his discharge, respondent participated in an illegal protest directed against petitioner's allegedly racially discriminatory employment practices; this protest, which consisted of temporarily blocking the access roads to petitioner's plant (a "stall-in"), resulted in respondent's arrest and conviction for the minor offense of obstructing traffic, for which he was fined fifty dollars (Pet. App. A–2 to A–3, A–22, A–43 to A–44).[1] Subsequently, in July 1965, petitioner advertised that jobs were available for mechanics, respondent's trade, and respondent ap-

[1] The district court also found that respondent participated in the illegal chaining of the door of a building in which certain of petitioner's employees worked (a "lock-in") (Pet. App. A–44, A–48), but the court of appeals rejected this finding as not supported by the record (Pet. App. A–7).

plied to petitioner for re-employment (Pet. App. A–3). Although respondent was qualified to fill the advertised position, which remained open, petitioner refused to rehire him (Pet. App. A–3, A–44).

Respondent filed a complaint with the Equal Employment Opportunity Commission, claiming that petitioner had refused to rehire him because of his race and his involvement in civil rights activities, in violation of Sections 703(a)(1) and 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(a)(1) and 2000e–3(a) (Pet. App. A–3). The Commission found that there was reasonable cause to believe that petitioner had violated Section 704(a) by refusing to employ respondent because of his civil rights activities; the Commission made no finding with respect to the charge of racial discrimination under Section 703(a)(1) (Pet. App. A–3). In March 1968, the Commission informed respondent that conciliation efforts had failed to achieve petitioner's voluntary compliance with the Act and advised him of his right to sue (Resp. Br. App. 4a to 5a).

Respondent then brought this action, claiming violations of both provisions (Pet. App. A–3 to A–4).[2] The district court dismissed the claim of racial discrimination under Section 703(a)(1), on the ground that a

[2] The original complaint alleged only a violation of Section 704(a); the complaint was subsequently amended to add an allegation under Section 703(a)(1) (Pet. App. A–3 to A–4). Respondent also contested the legality of his original discharge from employment, but both courts below held this claim barred by the statute of limitations (Pet. App. A–5 to A–6, A–45).

Commission determination of reasonable cause to believe a violation had been committed was a prerequisite to the filing of a private action (Pet. App. A–4). After a bench trial, the district court found that petitioner had refused to hire respondent because of his participation in illegal protests and not because of his involvement in legitimate civil rights activities (Pet. App. A–49) and held that such protests are not protected by Section 704(a) (Pet. App. A–47 to A–48). Respondent's complaint was therefore dismissed (Pet. App. A–49).

The court of appeals affirmed the dismissal of respondent's claim that the refusal to rehire him was based on his involvement in civil rights activities, in violation of Section 704(a) (Pet. App. A–6 to A–8).[3] But the court reversed the dismissal of respondent's Section 703(a)(1) claim relating to racially discriminatory employment practices, holding that a prior Commission determination of reasonable cause was not a jurisdictional prerequisite (Pet. App. A–8 to A–9).[4] The court ordered the case remanded for trial of that issue (Pet. App. A–11).

In remanding, the court of appeals stated some principles pertaining to the order and nature of proof which it believed should govern the trial of respond-

[3] Respondent has not sought review of this issue.

[4] The court was unanimous in its holding with respect to jurisdiction. However Judge Johnsen dissented from the reversal on the ground that since evidence pertaining to alleged racial discrimination had been introduced at trial, the issue had in fact been tried and decided against respondent (Pet. App. A–9 to A–11, A–27 to A–29).

ent's claims.[5] The court's statements on this point seem to contemplate the following procedure: (a) respondent, by showing that he was a member of a racial minority who was qualified for the job for which petitioner had sought applicants and for which he had applied, that he had been refused employment, and that the position had remained open, would present a *prima facie* case of racial discrimination; (b) in rebutting this case, petitioner could show that the refusal to hire was based on respondent's past participation in unlawful conduct against petitioner—the court observed that such conduct "might indicate the * * * lack of a responsible attitude toward performing work for [petitioner]" (Pet. App. A–32)—but any showing of merely "subjective, rather than objective, [hiring] criteria [would] carry little weight" (Pet. App. A–31); (c) once petitioner had furnished reasons for its hiring decision, respondent "should be given the opportunity to show that these reasons * * * were pretextual, or otherwise show the presence of racially discriminatory hiring practices * * * which affected [petitioner's] decision" (Pet. App. A–32 to A–33; footnote omitted).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The court of appeals correctly reversed the dismissal of respondent's claim that petitioner had engaged in a racially discriminatory employment practice in violation of Section 703(a)(1).

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[5] The court's initial opinion with respect to the order and nature of proof (Pet. App. A–11 to A–14) was superseded by a revised opinion (Pet. App. A–31 to A–33). Only the revised opinion is discussed here.

a. As petitioner acknowledges, the court of appeals followed "a significant trend of decisional law" (Br. 11) in ruling that a Commission finding of reasonable cause is not a jurisdictional prerequisite to suit under Title VII of the Civil Rights Act of 1964. See *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (C.A. 4); *Beverly* v. *Lone Star Lead Construction Corp.*, 437 F. 2d 1136 (C.A. 5); *Flowers* v. *Local No. 6, Laborers International Union of North America*, 431 F. 2d 205 (C.A. 7); *Fekete* v. *U.S. Steel Corp.*, 424 F. 2d 331 (C.A. 3). Respondent satisfied the requirements of the statute by filing timely charges with the Commission, raising the alleged violation of Section 703(a)(1). See 42 U.S.C. 2000e-5(a). Once the Commission had advised respondent that it was unable to achieve petitioner's voluntary compliance, he was entitled to bring an action based on the charges filed with the Commission. See 42 U.S.C. 2000e-5(e). The Act does not restrict a complainant's right to sue merely to those charges which the Commission has found substantial, and petitioner apparently no longer contends otherwise.[4]

b. The district court's dismissal of respondent's claims of racial discrimination was not harmless error. In the court of appeals, petitioner contended that even if the dismissal of that claim had been technically incorrect, since the district court had permitted the introduction of evidence pertaining to

[4] Petitioner does not argue in either its petition or its brief that the district court lacked jurisdiction to hear respondent's claim of racial discrimination under Section 703(a)(1).

alleged racial discrimination, the claim had in fact been tried and resolved adversely to respondent.[7] It is clear, however, that the claim was not tried. The district court did not discuss respondent's claim of racial discrimination in its opinion and it denied requests for discovery of statistical materials and other information relevant to that claim (see, *e.g.*, App. 11–25, 232–234). Since the district court did not treat the claim of racial discrimination as being before it, and for that reason barred discovery of relevant and possibly probative evidence, the factual issues pertaining to that claim remain undecided; those factual issues should, of course, be initially passed upon by the district court.[8]

2. The only other issue in this case relates to the correctness, not of the judgment below, but of the

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[7] It is not clear whether petitioner has abandoned this contention. Petitioner does not address the issue of harmless error expressly in either its petition or its brief, but its request that the judgment below be vacated and the cause remanded to the court of appeals with instructions that the judgment of the district court be affirmed (Br. 40) implies that respondent's claim of racial discrimination may be determined by this Court without further trial proceedings.

[8] In contending that this Court may determine respondent's claim without further trial proceedings (see n. 7, *supra*), petitioner relies upon the district court's finding that petitioner refused to rehire respondent because of his participation in illegal protests and not because of his involvement in legitimate civil rights activities. But this finding, which was made only in the context of respondent's Section 704(a) claim, leaves open, for example, the questions whether whites involved in similar protests, if any, were also refused employment and whether petitioner's refusal to rehire respondent actually conformed to a general pattern of disfavoring blacks. See pp. 11–14, *infra*.

appellate court's statement of principles pertaining to the order and nature of proof which should govern the trial of respondent's claim of racial discrimination.* As we explain in detail below, the court's guidelines for the proceedings on remand are suitable for trial of the remaining issues in this case, in light of the particular contentions and offers of proof previously made by the parties.

ARGUMENT

THE PRINCIPLES PERTAINING TO THE ORDER AND NATURE OF PROOF SET FORTH BY THE COURT OF APPEALS ARE PROPER FOR THE TRIAL OF RESPONDENT'S CLAIM OF RACIAL DISCRIMINATION

1. As we read the opinion below, the court of appeals described the order and nature of proof which would govern the trial of respondent's claim of racial discrimination in the following terms: (a) by showing that he was a member of a racial minority who was qualified for the job for which petitioner had sought applicants and for which he had applied, that he had been refused employment, and that the position had remained open, respondent would establish a *prima facie* case of discrimination; (b) in rebuttal, petitioner could show its reasons for refusing to hire respondent, such as his past participation in unlawful conduct against petitioner, but any showing of merely subjective hiring criteria would have little probative value; (c) respondent would then be given an opportunity to show that the reasons given by petitioner

*Petitioner's argument in its petition and brief is confined almost exclusively to this aspect of the case.

for its refusal to rehire were merely pretexts or that the decision was in fact based on or improperly affected by racial criteria. We discuss each of these three phases of proof in turn.

a. In describing respondent's initial burden of proof, the court of appeals stated (Pet. App. A–32):

> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination.

This statement with respect to the presentation of a *prima facie* case merely indicates the point at which the burden would shift to petitioner to come forward with a valid reason for its refusal to hire.

With the additions to be discussed in this paragraph (and perhaps intended by the court of appeals to be implicit in its formulation), we agree with this view of what constitutes a minimal *prima facie* case in a private, single-plaintiff action challenging employment discrimination. Such a plaintiff (who, unlike the plaintiffs in a class action, is concerned only with his own job) should not be required to meet an initial burden of proof extending beyond the facts of the rejection of his own application for employment. If such a plaintiff shows (1) that he belongs to a racial minority, (2) that he applied for a job for which the defendant was seeking applicants with his qualifications, (3) that he was refused employment without any apparent or stated objective reason for his rejection, and (4) that the employer continued to look elsewhere to fill the position with a person of his qualifications, it is then appropriate to look to the employer to come

forward with an explanation for its rejection of the qualified minority applicant, since whether the defendant had a nondiscriminatory reason for rejecting the applicant would ordinarily be a matter within its own, and not the applicant's, peculiar knowledge. If the employer then fails to come forward with a nondiscriminatory reason for rejecting the applicant, that fact, together with the showing made by the applicant, would, in our view, constitute an adequate basis to permit, although not to compel, the trier of fact to draw an inference of discrimination.[10]

In the present case, however, the issue of the question of proof required for a *prima facie* case is not before this court. For even if a more affirmative showing of discrimination were deemed necessary in private, non-class actions before the burden of coming forward would shift to the employer, in the circumstances of this case the standard stated by the court of appeals adequately guides the district court as to the proper order of proof upon remand. The court's statements with respect to the initial showing to be required of respondent should be read in the context of the proofs and contentions already made in the case: the court was aware that petitioner had in fact come forward with an objective reason—respondent's prior illegal

[10] A more affirmative showing of discrimination is required in class actions and in enforcement suits charging a pattern of discrimination. Cf. *United States* v. *Hayes International Corp.*, 456 F. 2d 112 (C.A. 5); *Bing* v. *Roadway Express, Inc.*, 444 F. 2d 687 (C.A. 5). And the use of statistics of employment and other documentary proofs can of course substantially strengthen the plaintiff's case in a private non-class action. See, *e.g.*, *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (C.A. 10), certiorari denied, 401 U.S. 954.

conduct—for refusing to hire respondent."[11] The court therefore anticipated that on remand in this case the respondent would be required to do substantially more than present "a *prima facie* case" in order to establish that petitioner's employment practices are racially discriminatory; respondent would be required "to show that these reasons offered by [petitioner] were pretextual, or otherwise show the presence of racially discriminatory hiring practices * * *" (Pet. App. A–32 to A–33; footnote omitted). Thus, when read as a whole and in its factual context, the court of appeals' opinion does not purport to set forth a "*prima facie* case" standard for all employment discrimination cases under Title VII, or even for all non-class actions brought by individual plaintiffs. The court was merely describing the showings that have so far been made, and those that remain to be made, in this particular case.

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[11] Although the court indicated that respondent's unlawful conduct "might indicate [his] lack of a responsible attitude toward performing work for [petitioner]" (Pet. App. A–32), the court properly avoided determining whether that conduct, viewed alone, would justify petitioner's refusal to rehire respondent. That question, which petitioner seeks to raise here (Br. 19–34), should not be considered in the first instance by a reviewing court. It is for the trial court, and not a reviewing court, initially to determine—in light of all the evidence, including the kind of evidence relating to racial discrimination which respondent was precluded from introducing at the first trial—whether petitioner's claimed ground for refusing to hire respondent is a mere pretext and, if not, whether when that ground is viewed, not alone, but in connection with all other relevant facts, a racially discriminatory purpose is nevertheless revealed.

b. The court of appeals stated in effect that although petitioner presumably would again come forward with objective criteria, such as prior unlawful conduct directed against petitioner, for refusing to rehire respondent, any evidence of merely subjective criteria would "carry little weight" (Pet. App. A–31). Contrary to petitioner's contention (Br. 34–39), this is a proper description of the worth of evidence concerning purely subjective hiring criteria in Title VII cases. In the context of this case, in which petitioner has already come forward with an objective reason, we read the court's statement merely as putting petitioner on notice that if respondent were to show that petitioner's alleged practice of excluding from employment persons who have been involved in illegal protests in fact has a significant racially discriminatory impact, petitioner would then be required to justify that practice on the basis of business necessity, rather than on subjective grounds alone. Employment practices which have been shown to have a substantial discriminatory impact may not be sustained merely by proof of good faith or of an absence of discriminatory intent. As this Court pointed out in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation". See, also, *Rowe* v. *General Motors Corp.*, 457 F. 2d 348 (C.A. 5). An employer may justify a practice having a substantial discriminatory impact only by showing that the practice is needed because

of considerations of safety, efficiency, or other necessities of the business. *Griggs* v. *Duke Power Co., supra; Local 189, United Papermakers* v. *United States*, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (C.A. 2). Whether the business necessity issue will arise at all in this case, however, remains to be determined on the basis of respondent's proof at trial.

c. The court below concluded that respondent should on remand be given an opportunity to show that the reasons given by petitioner for its refusal to rehire him were merely pretexts or that the decision was in fact based on or improperly affected by racial criteria. For the reasons discussed above, we believe this statement (along with other aspects of the opinion previously discussed) constitutes a fair summary of the present status of the case and of the burden of proof which respondent now carries.[12]

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[12] Although petitioner, erroneously in our view, contends that further trial proceedings are unnecessary (see notes 7 and 8, *supra*), we do not read petitioner's brief as suggesting that respondent should have no opportunity to show that the reasons given by petitioner were pretextual or based on or improperly

2. As we have shown (pp. 6–8, *supra*), the judgment of the court of appeals, reversing the dismissal of respondent's claim of racial discrimination under Section 703(a)(1), was, in our view, correct. The issues petitioner seeks to raise here—the requirements of a *prima facie* case, the proper weight to be accorded subjective evidence as to motivation, and whether petitioner's refusal to rehire respondent was in fact justified—do not appear ripe for review by this Court in the circumstances and present posture of this case.[13]

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affected by racial criteria. Petitioner's contention apparently is only that respondent has already been afforded that opportunity; petitioner seems to have no quarrel with the substance of the appellate court's description of the showing required of respondent.

[13] Indeed, only one of petitioner's contentions—that its refusal to rehire respondent was justified—calls into question the correctness of the judgment below. And that contention, as we have explained (pp. 7–8, *supra*), asks this Court to resolve factual matters which have not yet been fully tried.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed or, in the alternative, this Court should dismiss the writ of certiorari as improvidently granted.

Respectfully submitted.

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